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No. 02-58

IN THE
# SUPREME COURT OF THE UNITED STATES

EASTERN PILOTS MERGER COMMITTEE,
*Petitioner*,

v.

CONTINENTAL AIRLINES, INC.,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Continental's Brief in Opposition to the Petition is based on essentially one argument – that this matter has been before the Court previously and there is no more reason to grant certiorari now than there was then. This argument is entirely without merit. The decision below did not simply reiterate the Third Circuit's earlier decision in this proceeding (an earlier decision handed down by a panel of three different judges). Rather, its purported reading of that opinion constituted a substantial expansion of the court's prior holding – an expansion that will have a significant impact not only on Petitioner but on the law of the Third Circuit and, potentially, a highly troubled industry. Moreover, this expansion brings the Third Circuit directly into

conflict with the decision of another circuit rendered after this Court's earlier denial of certiorari.

## ARGUMENT

### I. *CONTINENTAL II* SUBSTANTIALLY EXPANDED THE HOLDING IN *CONTINENTAL I*.

Contrary to Respondent's assertion, the decision of the court below significantly enlarged the breadth of the decision in *Continental I*, with concomitant implications not only for the members of EPMC, but for the law of the Third Circuit, generally. This case is, accordingly, a very different case from the case with respect to which the Court denied certiorari in 1997.[1/]

Although the earlier panel decision ("*Continental I*") was not otherwise free of ambiguity, the panel was entirely unambiguous in stating that it was neither interpreting the collective bargaining agreement (the "Agreement") nor rendering a decision inconsistent with Bankruptcy Code § 1113. Pet. App. 71a n.8, 87a n.15. It also took care to note that its holding was "limited to how the [pilots'] claims should be treated in bankruptcy." *Id.* at 83a. In light of these statements, the most plausible reading of the opinion was that, by affirming

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[1/]It bears noting that even if this case were identical to *Continental I* – and for the reasons discussed in the text, it is not – this Court would not be precluded from deciding to grant review. This is especially true in light of the conflict between the decision in *Continental II* and the decision of the Court of Appeals for the Fifth Circuit in *Century Indemnity Co. v. National Gypsum Co. (In the Matter of National Gypsum Co.)*, 208 F.3d 498 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000), which arose only after the denial of certiorari in *Continental I*.

Continental's Confirmation Order, the court was disposing *only* of the pilots' pre-confirmation rights, and not any post-confirmation rights the pilots might be found to have under the Agreement, which had not been rejected in accordance with section 1113 and therefore remained to be interpreted in arbitration. In *Continental II*, however, the second panel chose to read *Continental I* in a manner that effectively nullified the Agreement, even though it had not been rejected in accordance with the statutory requirements. The second panel stated unequivocally that *all* of the pilots' rights had been reduced to monetary claims dischargeable in the bankruptcy, including their post-confirmation rights under the unrejected, ongoing Agreement.

Moreover, in a sharp departure from the original panel opinion, the *Continental II* panel expressly purported to do what it could not lawfully do: interpret the Agreement (which, it concluded, "provided a right of payment in lieu of injunctive relief"). In a feeble effort to explain away this clear violation of judicial authority, Respondent first quotes an irrelevant snippet from the oral argument in the ease and then says that the *Continental II* panel was "not using the word 'interpret' as a labor law term of art." Opp. at 19. It is difficult to keep a straight face when confronted with the argument that the court below did not really mean that it had "*interpreted*" the seniority provisions of "the Agreement" when those were its exact words (including the emphasis):

> In *Continental I*, this court, as did the bankruptcy court and the district court, did not reject the Agreement. We *interpreted* it. We construed the seniority provisions of the Agreement as a basis of providing a right of payment in lieu of injunctive relief after considering a variety of factors to include

> feasibility. (Pet. App. 6a-7a (emphasis in original)).

For these reasons, there is no merit to Respondent's assertion that the decision in *Continental II* is "merely an explanation of *Continental I*." Opp. at 10.[2/]

*Continental I*, on its face, was limited to the disposition of bankruptcy claims, and as the district court below acknowledged, Pet. App. 20a, it did not expressly address the prospective, post-confirmation rights of Petitioner's members under the Agreement. By contrast, *Continental II*, in a far-reaching decision that will affect the rights of union members in every bankruptcy proceeding in the Third Circuit, ruled that all of the pilots' rights under the Agreement could be reduced to monetary claims dischargeable in the bankruptcy, even though it also firmly reiterated the earlier panel's holding that the Agreement had not been rejected in accordance with the requirements of Bankruptcy Code § 1113. Under this decision, the pilots are left with the treatment they would have been afforded if the Agreement had been rejected. *Continental II* clearly warrants this Court's review.

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[2/]Equally meritless is Respondent's disingenuous assertion that Petitioner, "[i]gnoring their agreement to arbitrate," sought judicial enforcement of its members' rights under the seniority provisions of the Agreement. Opp. at 7-8. As the complaint in question clearly indicates, R. 374 *et seq.*, Petitioner was not seeking judicial enforcement of its members' rights, but rather a declaration *for purposes of the arbitration* that the decision in *Continental I* had not addressed their post-confirmation rights under the Agreement.

## II. RESPONDENT'S EFFORTS TO DISTINGUISH *NATIONAL GYPSUM* ARE UNAVAILING.

Respondent attempts to distinguish this case from *National Gypsum* in two ways, neither of which withstands even minimal scrutiny. The conflict between the two decisions is irreconcilable.

Respondent first makes the misguided effort to distinguish *National Gypsum* on the ground that, unlike the facts in that case, "Continental never assumed the collective bargaining agreement under the Bankruptcy Code." Opp. at 13. This is precisely where Petitioner and Respondent join issue. To be sure, a garden variety executory contract must be assumed expressly, with the approval of the bankruptcy court. 11 U.S.C. § 365(a). Both substantial case law and common sense confirm, however, that an *unrejected* collective bargaining agreement – an executory contract for which Congress has, in 11 U.S.C. § 1113, mandated special treatment – is assumed by operation of law. *See, e.g., Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 796 (4th Cir.), *cert. denied*, 522 U.S. 962 (1998); *In re Roth American, Inc.*, 975 F.2d 949, 957 (3d Cir. 1992). If Respondent is attempting to distinguish between a collective bargaining agreement not rejected in accordance with the requirements of law and a collective bargaining agreement that is "assumed," such an attempt to distinguish the indistinguishable must itself be rejected if the Code is to be enforced in accordance with its provisions.[3/]

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[3/]Even the one appellate court that purports not to accept the principle that an unrejected collective bargaining agreement is assumed by operation of law has recognized that, if a debtor fails to reject the agreement, the agreement "effectively 'rides through' the bankruptcy process," *UFCW Local 211 v. Family Snacks, Inc. (In re Family Snacks, Inc.)*, 257 B.R. 884, 907

Indeed, the weaknesses in Respondent's argument are highlighted by the authority it cites to support it. In arguing that Continental never assumed the Agreement in this case, Respondent quotes the decision below as stating: "The reality is the [collective bargaining agreement] was never *assumed*." Opp. at 13 (emphasis added). What the court actually said was: "The reality is that the Agreement has never been *rejected*." Pet. App. 6a (emphasis added). Thus, the court's *actual* statement, which is 180 degrees from Respondent's version of it, supports Petitioner's view, not Respondent's. The only other authorities cited by Respondent are two Third Circuit decisions discussing the assumption of leases under Bankruptcy Code § 365, which have no relevance to whether an unrejected collective bargaining agreement is assumed by operation of law pursuant to the strictures of Bankruptcy Code § 1113.

Equally important, the holding in *National Gypsum* is not limited to *assumed* contracts – it applies to any contract that is not rejected. 208 F.3d at 507 ("a claim arises only from the rejection of an unexpired lease or executory contract"). Both the decision in *Continental I* and the decision in *Continental II* held unequivocally that Continental had not rejected the Agreement; thus, the conflict between the decision below and

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n.19 (B.A.P. 8th Cir. 2001) (citation omitted). This was likewise the law prior to the enactment of section 1113. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 546 n.12 (1984) (Brennan, J., concurring and dissenting). Thus, whether the Agreement at issue here was assumed by operation of law or merely "rode through" Continental's bankruptcy, the result is the same: under the law as articulated by the Fifth Circuit in *National Gypsum*, the unrejected contract did not give rise to a "claim" dischargeable in bankruptcy. The decision below cannot be reconciled with that holding.

*National Gypsum* is squarely presented even if the Agreement were not deemed assumed by operation of law.

The second distinction Respondent seeks to draw between the decision below and the decision in *National Gypsum* is equally unavailing. Respondent contends, Opp. at 4, 13-14, that the fact that the pilots filed bankruptcy claims makes this case legally distinguishable from *National Gypsum*, in which no claims were filed by the non-debtor party to the unrejected contract. This is a meaningless distinction. The pilots filed claims in this case because Continental had filed a motion in the bankruptcy court (which was ultimately never addressed) seeking a ruling that they were not bound by the collective bargaining agreement. *See* Pet. at 6-7 n.4. In addition, Continental had the right to move to reject the agreement under section 1113 at any time prior to confirmation of its plan of reorganization, and the pilots therefore could not know that the agreement would not be rejected until after the date of the confirmation.[4/] And in any event, all of Petitioner's members have now withdrawn their claims. *See* Pet. at 11-12 n.6. The fact that circumstances existed in this case making it prudent to file protective claims is entirely irrelevant to the question whether those claims continued to exist after Continental failed to reject the Agreement. Nothing in *National Gypsum* suggests that the creditor's failure to file a bankruptcy claim in that case was relevant to the court's holding that no claim exists under an unrejected executory contract.

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[4/]Although the Bankruptcy Code does not require a creditor to file a claim in such circumstances, *see*, *e.g.*, *National Gypsum*, 208 F.3d at 505 & n.6, it is often prudent to do so, especially where, as here, there are other issues before the bankruptcy court that bear on the matter with respect to which the claim is filed.

## III. RECENT EVENTS EMPHASIZE THE IMPORTANCE OF THE ISSUES IN THIS CASE.

As pointed out by *amicus* Allied Pilots Association (the "APA"), the airline industry is currently facing a period of unprecedented financial instability. Events of the past week alone dramatically illustrate the APA's point. On August 11, 2002, US Airways, the nation's seventh-largest airline, filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of Virginia. Susan Carey, *US Airways, Hit Hard by Terror, Files Chapter 11*, Wall St. J., Aug. 12, 2002 at A1. Labor issues are central to the airline's financial difficulties, and it has already announced that it will seek to invalidate collective bargaining agreements with the International Association of Machinists and the Communications Workers of America if it is unable to achieve wage and benefit concessions by August 30, 2002. Jim McKay, *Bankruptcy Filing Prompts Union Leaders to Let Members Decide Fate*, Pittsburgh Post-Gazette, Aug. 16, 2002 at E-1. On August 13, 2002, American Airlines announced a major restructuring involving 7,000 layoffs, leading to protests among former TWA pilots who were recently integrated into the American Airlines seniority list and will be among the first to be laid off. Scott McCartney, *American Airlines to Retrench in Bid to Best Discount Carriers*, Wall St. J., Aug. 13, 2002 at A8. And on August 14, 2002, United Airlines warned that it had established a 30-day deadline for reaching new cost-cutting agreements with its unions, in the absence of which it would consider filing for bankruptcy later this year. Susan Carey, *UAL Warns of Chapter 11 Filing*, Wall St. J., Aug. 15, 2002 at A3.

Of course, the implications of the decision below are not confined to the airline industry. The court's holding, now the law of the Third Circuit – that the rights of union members under a collective bargaining agreement may be reduced to dischargeable monetary claims despite rejection of the

agreement pursuant to the requirements of Bankruptcy Code § 1113 – has potentially negative consequences for all unionized workers of bankrupt companies. In a recessionary economy with bankruptcy filings at record levels,[5] we submit that there is a clear need for this Court to resolve the conflict in the circuits over this exceptionally important issue.

## CONCLUSION

For the reasons described above and in the Petition, EPMC respectfully requests that the petition for certiorari to the Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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[5] Administrative Office of the U.S. Courts, *News Release* (May 16, 2002), *available at* www.uscourts.gov/Press_Releases/bk302.pdf (total filings for 12-month period ending March 31, 2002 break record).